RECENT SIGNIFICANT DECISIONS

Shareholder Fraud, AIR21, 29 CFR Part 24, and 29 CFR Part 1978 Whistleblower Cases

October 8, 2002

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Thomas M. Burke
Associate Chief Judge for
Black Lung and Traditional

Highlights of this issue:

United States Supreme Court Rulings

dismissal of discrimination complaint based on pleadings prohibited; time limitations on filing in discrimination claims; state sovereign immunity

Fraud Against Shareholders

Sarbanes-Oxley Act of 2002 enacted

AIR21 Decisions

administrative notice; standards of proof; job actions by complainant; derivative protection for spouse of whistleblower; protecting sensitive information; dismissals for cause; frivolous complaints; protected activity: objectively reasonable standard, complainant's motive, report of safety problem to pilot

Nuclear and Environmental Decisions

II. Filing requirements, generally
dismissal of discrimination complaint based on pleadings prohibited

III. Time Limits on Filing
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VI. Request for Hearing
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UNITED STATES SUPREME COURT RULINGS

The following rulings of the United States Supreme Court may be of relevance to DOL whistleblower adjudications.

[Nuclear & Environmental Whistleblower Digest II B]
[STAA Whistleblower Digest II P]

DISCRIMINATION COMPLAINT MAY NOT BE DISMISSED SOLELY FOR FAILURE TO PLEAD FACTS SUFFICIENT TO SATISFY PRIMA FACE CASE

In a Title VII case, ***Swierkiewicz v. Soreman***, 534 US 506, 122 S Ct 992, 152 L Ed 2d 1 (2002), the United States Supreme Court held that complaints of employment discrimination cannot be dismissed solely for having failed to plead facts to satisfy each element of the *McDonnell-Douglas* standard for establishing a prima facie case. The Court held that such a complaint is only required to satisfy Fed. R. Civ. P. 8(a)(2)'s requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief."

The Court observed that this ruling does not prevent a Respondent from filing a motion for a more definite statement under Rule 12(e), and that meritless claims may be dealt with through summary judgment under Rule 56.

[Nuclear & Environmental Whistleblower Digest III A and III C 4]
[STAA Whistleblower Digest II B 2]

TIME LIMITATIONS ON FILING IN DISCRIMINATION CLAIMS, GENERALLY

In ***National Railroad Passenger Corp. v. Morgan***, _ US _, 122 S Ct 2061, 153 L Ed 2d 106 (2002), a Title VII claim, the United States Supreme Court examined the application of time limitations in situations involving the raising of claims of discrete discriminatory or retaliatory acts, and situations involving charges alleging a hostile work environment. The Court held that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his or her charge within the statutory period, but that claims based on a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. In neither instance is a court barred from applying equitable doctrines that may toll or limit the time period. An employer may raise laches if the plaintiff unreasonably delays filing and as a result harms the defendant.

[Nuclear & Environmental Whistleblower Digest XX E]

STATE SOVEREIGN IMMUNITY; ELEVENTH AMENDMENT BARS FEDERAL AGENCY FROM ADJUDICATING PRIVATE PARTY'S COMPLAINT AGAINST A NON-CONSENTING STATE

In ***Federal Maritime Commission v. South Carolina State Ports Authority***, _ US _, 122 S Ct 1864, 152 L Ed 2d 962 (2002), a case arising under the Shipping Act of 1984, the United States Supreme Court held that State sovereign immunity bars the FMC from adjudicating a private party's complaint against a non-consenting State. Earlier, in *Ewald v. Commonwealth*

of Virginia Dept. of Waste Management, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Jan. 31, 2002), the ARB had granted a stay on briefing on the ground that the anticipated *South Carolina State Ports Authority v. Federal Maritime Comm'n* decision would likely affect the disposition of the Ewald appeal. *See also Rhode Island Dept. of Environmental Management v. U.S. Dept. of Labor*, Nos. 00-2326 and 01-1543 (1st Cir. Apr. 8, 2002) (First Circuit holding that state sovereign immunity principles bar the private prosecution of whistleblower complaints against state agencies before the OALJ and the ARB, unless DOL prosecutes such cases as a party).

See also casenotes under Nuclear & Environmental Whistleblower Digest XX E, *infra*.

FRAUD AGAINST SHAREHOLDERS WHISTLEBLOWER PROTECTION SARBANES-OXLEY ACT OF 2002

FRAUD AGAINST SHAREHOLDERS WHISTLEBLOWER PROTECTION

On July 30, 2002, the **Sarbanes-Oxley Act of 2002**, P.L. 107-204 was signed into law by President Bush. **Section 806** of the Act, to be codified at 18 U.S.C. § 1514A, is a whistleblower provision that provides protection for employees of publicly traded companies who provide "information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders...." Complaints under this provision are filed with the Secretary of Labor, who is to investigate and adjudicate the matter under the rules and procedures found in the statutory AIR21 whistleblower provision. The Sarbanes-Oxley whistleblower procedure is somewhat different than AIR21 – and all other whistleblower cases administered by the DOL – in that if the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that such delay is due to the bad faith of the claimant, the claimant may bring an action at law or equity for de novo review in the appropriate district court of the United States.

In addition to the civil whistleblower provision at section 1107 (to be codified at 18 U.S.C. § 1513), the Act also includes a criminal penalty for retaliation against informants.

AVIATION INVESTMENT AND REFORM ACT FOR THE 21ST CENTURY ["AIR 21"] WHISTLEBLOWER DECISIONS

ADMINISTRATIVE NOTICE; COURT OF APPEALS DECISION

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ARB Apr. 25, 2002), Respondent submitted a Motion for Court to Take Administrative Notice of a Seventh Circuit Opinion to establish that Complainant participated in a union-orchestrated, systematic ,work slowdown or work-to-rule action which resulted in flight delays, conducted in the midst of contentious contract negotiations. In the Seventh Circuit opinion, the court found "clear proof" of the union's complicity. Respondent argued before the ALJ that the present whistleblower dispute must be viewed through the lens of this larger national context."

The ALJ reviewed the law relative to the doctrine of taking administrative notice in

administrative proceedings, and accepted Respondent's argument that it is broader in administrative cases than in traditional cases. The ALJ found, however, that

> The general rule is that courts can and do take judicial notice of related proceedings in their own jurisdictions and the fact of and procedural history of litigation in other courts. However, while courts can take notice that certain facts were found in another proceeding, they are not bound to accept those facts as true. Weinstein & Berger, Weinstein's Federal Evidence, § 201.12[3], pages 201-33 - 201-37 (2d Ed. 1998) and cases cited therein, at notes 40-40.1. The theory is that such findings are disputable.

With this background, the ALJ ruled:

> The Seventh Circuit's opinion makes it clear that the union and UAL disputed the facts of the case. The Seventh Circuit matter is collateral to the issues in the present case. However, it may be both helpful and relevant to establish the factual background in the case sub judice. Relitigating the facts of the earlier dispute between UAL and the union, in this case, would precipitate an untenable and unnecessary burden on the parties and this court. The law is such that I may take administrative notice of the facts found in that proceeding and I do so. However, I will not accept those facts as true, but rather only to show what the work atmosphere at UAL was and the premises UAL was operating under during the time frame surrounding the allegations in the present matter.

(footnotes omitted).

APPLICABLE DECISIONAL LAW; BURDENS OF PROOF AND PRODUCTION

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), the ALJ reviewed the legislative history of AIR21's whistleblower provision, and concluded that the decisional law developed under the ERA, the Whistleblower Protection Act, and the whistleblower provisions of federal environmental statutes, provide the framework for litigation arising under AIR21.

The ALJ then set out a statement of the burden of proof standards, similar to the statement of such by the ALJ in *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Feb. 15, 2002) (which was casenoted in the April 3, 2002 newsletter), with some additional clarifications. For example, the ALJ noted that the "contributing factor" element is only applicable to the establishment of a *prima facie* case.

CAUSATION; INCONSISTENCIES BETWEEN FORMAL PERFORMANCE APPRAISALS AND ULTIMATE SELECTION FOR LAYOFF DOES NOT CARRY BURDEN OF PROOF WHERE PROTECTED ACTIVITY DID NOT FACTOR INTO THE LAYOFF DECISION

In ***Parshley v. America West Airlines***, 2002-AIR-10 (ALJ Aug. 5, 2002), the Complainant was selected for layoff during a company-wide cost reduction program based on performance issues. The ALJ found that both Complainant and her supervisor gave mostly credible testimony about the circumstances leading to the layoff. Ultimately, Complainant was unable to show by a preponderance of the evidence that her protected activity contributed in any manner to the decision to layoff Complainant. Although Respondent's articulated reason for termination -- the cost reduction program -- seemed to be undercut by evidence that Complainant's position was filled by a new employee within a few weeks, the ALJ also found credible evidence that

Respondent had been able to obtain payroll savings in other areas to offset the new hire. With the initiation of the cost reduction program, Complainant's supervisor had been under pressure to improve the business effectiveness and customer service on his financial group. The record was well documented that Complainant's supervisor had received repeated complaints about Complainant's difficulties in interacting with the financial group's "customers" within the company. Thus, in spite of the fact that there were inconsistencies between Complainant's formal performance appraisals, advancement in the company, and subsequent selection for termination on the basis of performance, the ALJ found that Complainant had not carried her burden of proof. In sum, the ALJ found that although Complainant had mentioned an issue to her supervisor about a problem with FAA-required serviceable tags for aircraft parts in inventory, she did not highlight the problem as a safety issue, and that from the supervisor's perspective, the conversation was an ordinary business exchange -- not involving safety issues -- which played no part in his decision to terminate Complainant's employment.

CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WOULD HAVE TAKEN SAME ADVERSE EMPLOYMENT ACTION IN ABSENCE OF PROTECTED ACTIVITY; EVIDENCE THAT DELAY PERFORMANCE DETERIORATION WAS LINKED TO JOB ACTION TO SUPPORT CONTRACT NEGOTIATION

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), although the ALJ found that the Complainant engaged in protected activity when he reported safety concerns directly to the flight crew after the maintenance supervisor had dismissed the concerns, the ALJ nevertheless found that Respondent had established by clear and convincing evidence that it would have taken the same adverse employment actions against the Complainant even in the absence of those incidents where Respondent's stated reason for the action was Complainant's unsatisfactorily explained deterioration in delay performance following expiration of the union contact. In the 13 days following the expiration of the contract, Complainant had more delays attributed to him than in the entire first 6 months of the year. Respondent believed this to be an illegal job action, and terminated Complainant solely for this reason. The ALJ expressly found that Respondent had not taken into consideration whether the maintenance writeups made by Complainant were safety-related, but in a footnote observed that termination for consistently failing to dispatch in time might be a violation of the Act if the delays were associated with reports of safety concerns. The ALJ, in his conclusion, emphasized that he was not determining whether Complainant was engaged in an illegal job action -- rather, all that was relevant was Respondent's motivation, and it was established that Respondent fired Complainant because it believed he was engaged in an illegal job action.

DERIVATIVE WHISTLEBLOWER PROTECTION FOR SPOUSES

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ARB Apr. 23, 2002) (ruling on motion for summary judgment), the ALJ found that "the plain language of the AIR Act does not expand its protection to spouses of whistleblowers, where the spouse did not personally engage in a protected activity."

DISCOVERY AND EVIDENCE; PROTECTING SENSITIVE, BUT UNCLASSIFIED INFORMATION POTENTIALLY RELATING TO HOMELAND SECURITY

In ***Blackburn v. Mesaba Aviation, Inc.***, 2002-AIR-22 (ALJ Sept. 20, 2002), the ALJ concluded that due to the nature of the case, it might be possible that a party may seek to discover or use sensitive, but unclassified, material regarding weapons of mass destruction or other sensitive records relating to Homeland Security. Thus, the ALJ issued an order directing counsel to bring

to the ALJ's immediate attention the potential use of such information so that steps could be take to handle the information appropriately.

DISMISSAL FOR CAUSE; KNOWING AND VOLUNTARY WITHDRAWAL; FAILURE TO PROSECUTE

In ***Harnois v. American Eagle Airlines***, 2002-AIR-17 (ALJ Sept. 9, 2002), the Respondent filed a motion seeking an order compelling Complainant to comply with discovery requests. The ALJ issued an order setting out the Complainant's obligations relative to discovery and directing Complainant to address whether the case was in a posture to proceed to hearing. Complainant responded complaining that he had received a notice of deposition only one day before it was scheduled and that Respondent's discovery time-frames were unreasonable. Complainant also, apparently frustrated with the DOL handling of the case prior to referral to the OALJ, and in the apparent belief that he could not obtain a fair hearing, moved to withdraw his objection to the Secretary's findings, stating that he might appeal to Congress for an investigation by another agency. The ALJ continued the case, made a number of procedural rulings, encouraged Complainant to find an attorney, and declined to accept Complainant's motion to withdraw. Noting that acceptance of a withdrawal motion is discretionary, the ALJ concluded that a withdrawal must be made "knowingly and voluntarily and that withdrawal under the circumstances [must] not [be] inconsistent with the important policies underlying the Act." The ALJ, considering ALJ's pro se status, and the grounds stated by Complainant for withdrawal, declined to approve withdrawal.

Thereafter, Complainant sent a letter to the ALJ which, *inter alia*, requested that DOL cease any involvement with the complaint. The ALJ issued an order relating to the letter which, *inter alia*, made some discovery rulings, and denied withdrawal of the appeal. The order, however, permitted Complainant to renew his withdrawal of objections with the knowledge that such a dismissal would be final. Thereafter, Respondent moved to dismiss based on Complainant's failure to comply with the earlier discovery order. The ALJ issued an order to show cause, and Complainant did not respond. Based on the circumstances, the ALJ granted Respondent's motion to dismiss.

DISMISSAL FOR CAUSE; FAILURE TO COMPLY WITH ALJ'S ORDER FOR SUBMISSION OF PREHEARING STATEMENTS

In ***Hafer v. United Air Lines***, 2002-AIR-5 (ALJ June 11, 2002), the ALJ dismissed the case after Complainant failed to timely submit a prehearing statement of position, despite warnings that failure to do so could result in sanctions. The ALJ acknowledged that the sanction of dismissal was extreme, but took into account that there had been several failures by Complainant and that Complainant was represented by counsel. The ALJ noted that it might appear that a lesser sanction of prohibiting Complainant from presenting witnesses or exhibits would be appropriate, but that if Complainant could not present witnesses or evidence, the hearing would be a meaningless exercise.

FRIVOLOUS COMPLAINT SANCTION; FACTS AS DETERMINED THROUGH LITIGATION DO NOT NEGATE COMPLAINANT'S ORIGINAL, SINCERE SUSPICION THAT PROTECTED ACTIVITY PLAYED A ROLE IN HER LAYOFF

In ***Parshley v. America West Airlines***, 2002-AIR-10 (ALJ Aug. 5, 2002), the ALJ declined to order Complainant to pay attorney fees up to $1,000 to Respondent based on the frivolous complaint sanction of 49 U.S.C. § 42121(b)(3)(C) and 29 C.F.R. § 1979.109(b), where

Complainant had been able to establish a *prima facie* case and had established inconsistencies between Complainant's formal performance appraisals, advancement in the company, and subsequent selection for termination on the basis of performance. The ALJ found that Complainant had an understandable and sincere suspicion that her protected activity had been involved in her termination, even though the facts as developed through litigation failed to confirm her suspicion.

PROTECTED ACTIVITY; OBJECTIVELY REASONABLE BELIEF OF VIOLATION OF FAA REGULATION OR OTHER AVIATION LAW

In ***Parshley v. America West Airlines***, 2002-AIR-10 (ALJ Aug. 5, 2002), the ALJ reviewed the principles developed in environmental whistleblower cases, and found that a protected activity under AIR 21 similarly has two elements: (1) the complaint must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; (2) the complainant's belief about the purported violation must be objectively reasonable.

The ALJ noted that there is a caselaw mandate to broadly interpret the meaning of protected activity. The ALJ nonetheless concluded that Complainant's reporting to her supervisor that she had received a report that an individual had made improper computer entries indicating the completion of an inspection step for 800 incoming aircraft parts, without verifying completion of an inspection for documenting serviceability, was not protected activity. The ALJ found that this was not protected activity because Complainant had failed to identify any FAA regulation or aviation statute that requires such a computer inventory system. The ALJ was unwilling to drawn an inference that such a process was required for FAA mandated inspections and certifications. The ALJ, however, did find that Complainant engaged in protected activity when she reported to her supervisor that some aircraft parts in the warehouse did not have an FAA-required serviceable tag, based on credible testimony that such tags were required by the FAA.

PROTECTED ACTIVITY; MAINTAINING AIRCRAFT MAINTENANCE LOGS

In ***Szpyrka v. American Eagle Airlines, Inc.***, 2002-AIR-9 (ALJ July 8, 2002), Complainant alleged that Respondent reprimanded and suspended him in retaliation for recording safety-related mechanical deficiencies in aircraft maintenance logs causing the removal of aircraft from passenger transport service and necessitating costly repairs. Respondent alleged that Complainant was disciplined for purposely waiting to make those records in locations where Respondent would have to pay a contractor rather than Respondent's own mechanics to make any needed repairs, at a greater cost to Respondent, for the purpose of voicing his dislike of the company.

Respondent filed a motion for summary decision based, *inter alia*, on the argument that mere entry of observations in aircraft maintenance logs does not, in and of itself, constitute either violations of federal regulations or a "proceeding" within the meaning of AIR21. The ALJ declined to grant summary decision on this basis, finding:

> To be sure, it is not the existence of the pre-flight discrepancy which constitutes a violation, and a crew member's notation in a maintenance log is not a proceedings. Yet, an attempt to retaliate for, interfere with, or improperly influence the performance of a duty required by the FAR may trigger the protections of AIR 21. Consequently, if an airline seeks retribution against an aircrew member for performing required safety-related missions or if it engages

in harassment, intimidation, or coercion in an attempt to interfere with an aircrew member's duty in the future, honestly and objectively, to carry out pre-flight inspection and reporting obligations, the airline's action may implicate the broad, remedial protections afforded by AIR 21. Since the circumstances which may constitute such interference are fact-specific, summary decision would be inappropriate.

PROTECTED ACTIVITY; MAINTAINING AIRCRAFT MAINTENANCE LOGS; OBJECTIVELY REASONABLE PERCEPTION STANDARD

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), the ALJ applied ERA whistleblower caselaw to find that a report of any objectively reasonable perceived violation of federal laws or standards relating to air carrier safety is protected activity, even if the allegation is not ultimately substantiated.

PROTECTED ACTIVITY; COMPLAINANT'S MOTIVE MAY INFLUENCE WHETHER CONDUCT WAS PROTECTED

In ***Szpyrka v. American Eagle Airlines, Inc.***, 2002-AIR-9 (ALJ July 8, 2002), Complainant alleged that Respondent reprimanded and suspended him in retaliation for recording safety-related mechanical deficiencies in aircraft maintenance logs causing the removal of aircraft from passenger transport service and necessitating costly repairs. Respondent alleged that Complainant was disciplined for purposely waiting to make those records in locations where Respondent would have to pay a contractor rather than Respondent's own mechanics to make any needed repairs, at a greater cost to Respondent, for the purpose of voicing his dislike of the company.

Complainant filed a motion for summary decision, arguing that, even if he acted maliciously, AIR21 protects behavior (the pre-flight inspection) that was a contributing factor in the unfavorable personnel action. The ALJ declined to grant summary decision, finding that although AIR21 might impose a lightened burden in establishing a prima facie case, the caselaw suggests that the circumstances of the case necessitate a fact-dependent inquiry focusing on the true impulses motivating the employee's actions, *citing Zurenda v. J&K Plumbing & Heating Co. Inc.*, 1997-STA-16 (ARB June 12, 1998).

PROTECTED ACTIVITY; COMPLAINTS MADE TO EMPLOYEES WITHOUT CONTROL OVER COMPLAINANT'S EMPLOYMENT; COMPLAINTS TAKEN TO THE PILOT DESPITE MAINTENANCE SUPERVISOR'S CONCLUSION THAT THE AIRCRAFT WAS FLIGHT WORTHY

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), the ALJ rejected Respondent's contention that complaints which touch on aircraft safety made internally to those without control over the complainant's employment are not protected activities. The ALJ held that the established law is that even complaints to co-workers as well as "informal" complaints to supervisors can be protected activities and that the form of the "complaint" is not critical. The ALJ held that at the point where on-duty maintenance supervisors and the pilots were informed by Complainant of potential safety defects, the reports became protected activity -- the ALJ finding that both the supervisors and pilots were in a position to act on safety related complaints.

The ALJ also held that "[e]ven though United might believe supervisors may be better at

balancing the potential for delay versus a repair requirement, the broad purpose of the Act would best be served by protecting mechanics, particularly those with A&P licenses, who have such differences of opinion with supervisors regarding a safety issue and who take the matter to the flight crew." (footnote omitted).

II. Filing requirements, generally

[Nuclear & Environmental Whistleblower Digest II B]
DISMISSAL OF DISRIMINATION CASE ON PLEADINGS PROHIBITED

See casenote on ***Swierkiewicz v. Soreman***, 534 US 506, 122 S Ct 992, 152 L Ed 2d 1 (2002), *supra* at Supreme Court summary.

III. Time limits on filing

[Nuclear & Environmental Whistleblower Digest III A and III C 4]
TIME LIMITATIONS ON FILINGS IN DISRIMINATION CLAIMS, GENERALLY

See casenote on ***National Railroad Passenger Corp. v. Morgan***, _ US _, 122 S Ct 2061, 153 L Ed 2d 106 (2002), *supra* at Supreme Court summary.

[Nuclear & Environmental Whistleblower Digest III B 1]
FILING OF HEARING REQUEST; CALCULATION OF TIME PERIOD

In ***Gale v. Ocean Imaging***, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002), the ARB cited with approval the following description by the presiding ALJ of how the time period for requesting a hearing with OALJ under 29 C.F.R. Part 24 is calculated:

> Once the Department issues its decision, the complainant has five days to request a hearing, by forwarding either a telegram or facsimile to the Chief Administrative Law Judge. 29 C.F.R. § 24.4(d)(2)(i). Computation of this period requires that the day following the receipt of the decision commences the time period, the fifth day is included in the computation, and intermediate Sundays are excluded since the prescribed period is less than seven days. 29 C.F.R. § 18.4(a).

VI. Request for hearing

[Nuclear & Environmental Whistleblower Digest VI D]
REQUEST FOR HEARING; FAILURE TO USE TELEGRAM (UNDER OLD REGULATIONS)

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 00-082, ALJ No. 2000-ERA-23 (ARB Aug. 30, 2002), the ARB agreed with the ALJ's finding that if a hearing request was timely filed, it did not matter that the request was made by facsimile transmission rather than by telegram, as required by the applicable regulation at the time 29 C.F.R. § 24.4(d)(2)(i) (1993). The ARB declined to adopt Respondent's argument that the mode of the request was important because

the Complainant had evidently sent the fax to OALJ's administrative offices rather than to the Docket section, the ARB noting that neither the instructions provided by the Wage and Hour Division or the regulations specified that hearing requests had to be directed to the Docket section, but rather, only to the Chief ALJ. The ARB noted that even the current regulations do not specify that a faxed hearing request must be sent to the Docket section.

VII. Proceedings before OALJ

[Nuclear & Environmental Whistleblower Digest VII A 2]
DISCOVERY; LIMITATIONS THAT DO NOT AFFECT ABILITY TO DISCOVER FACTS RELEVANT TO ERA GATEKEEPING ELEMENTS

In ***Hasan v. USDOL***, No. 01-9521 (10th Cir. Apr. 26, 2002) (case below 2000-ERA-14), the Complainant presented a refusal to hire complaint. The ALJ and ARB dismissed the complaint because Complainant failed to allege all the elements of a refusal to hire case, as required by the ERA "gatekeeping" provision at 42 U.S.C. § 5851(b)(3). On review before the Tenth Circuit, the Complainant alleged, *inter alia*, that the DOL decision was in error because he had been denied discovery. The court, however, found that none of Complainant's discovery requests were relevant to the crucial element that he had failed to plead – that Respondent hired someone with Complainant's qualifications to fill an open position or that Respondent continued to seek someone with Complainant's qualifications for an open position. Accordingly, the ARB's decision to dismiss the action prior to discovery did not affect Complainant's ability to state a viable claim.

Complainant's discovery had sought (1) any information maintained by Respondent which in any way concerned or mentioned him as well as reports of all verbal contacts with anyone about him; (2) the names, qualifications and experience of all civil/structural/pipe support engineers working for Respondent as well as all contractors, subcontractors, and architectural and engineering firms contracting with respondent in all locations; and (3) all information about any of respondent's employees or other job applicants who had filed whistleblower complaints.

[Nuclear & Environmental Whistleblower Digest VII A 5]
RECUSAL; ALLEGATION OF PARTICIPATION IN CONSPIRACY, ANIMUS, PERSONAL AND PROFESSIONAL RELATIONSHIP TO COMPLAINANT

In ***Greene v. U.S. Environmental Protection Agency***, 2002-SWD-1 (ALJ June 20, 2002),the presiding ALJ had disqualified Complainant's counsel based on a finding of misconduct. After being instructed by the Chief ALJ on the regulatory process for filing an appeal of an order of disqualification, *see* ***In the Matter of Slavin***, 2002-SWD-1 (ALJ June 24, 2002), counsel filed an appeal with the Chief ALJ in which he requested that the Chief ALJ recuse himself from consideration of the appeal. The Chief ALJ found that the motion for recusal was improperly pleaded, as it did not include an affidavit setting forth the alleged grounds for disqualification as required by 29 C.F.R. § 18.31(b). *See* ***In the Matter of Slavin***, 2002-SWD-1 (ALJ July 2, 2002). Counsel, however, was given leave to renew the motion in proper form. The Chief ALJ denied a motion for stay of the Complainant's case on the merits because 29 C.F.R. § 18.36(b) prohibits a delay or suspension of the case-in-chief during the appeal of a disqualification order.

Counsel thereafter renewed the motion to recuse, and purportedly filed it also on behalf of Complainant (Complainant, however, evidently did not authorize counsel's brief accompanying the motion). The motion was based, *inter alia*, on allegations that the Chief ALJ was part of a conspiracy that counsel had theorized had been formed to select a presiding judge who was

pre-disposed to rule against Complainant, that the Chief ALJ held animus against counsel based on prior interactions (including the Chief ALJ's referral of counsel's conduct in other cases to the Board of Professional Responsibility in the state in which counsel held his law license), and - in a supporting affidavit filed by the former Chief ALJ of the DOL -- that the current Chief ALJ should be disqualified because of his personal and professional relationship with the former Chief ALJ and his wife – who was the Complainant in the underlying matter. *See* ***In the Matter of Slavin***, 2002-SWD-1 (ALJ July 26, 2002). The Chief ALJ found that the conspiracy theory was not grounded in any fact and therefore did not merit consideration as a ground for recusal. He found that his past criticism of counsel was based on counsel's conduct in proceedings before OALJ, and that "[f]acts learned by a judge in his or her judicial capacity . . . cannot form the basis for disqualification." *Id.* (Citations omitted).

The Chief ALJ, however, did find that his personal and professional relationship with Complainant was a disqualifying factor, and that in fact, both Associate Chief ALJs also had a similar disqualifying relationship, thereby rendering it impossible to follow the regulatory procedure for consideration of an appeal by the Chief ALJ of an ALJ's disqualification of counsel. *Id.* Based on the precedent of *Holub v. H. Nash Babcock & King, Inc.*, 1993-ERA-25 (Sec'y Feb. 6, 1995), the Chief ALJ recommended to the Secretary of Labor that the ARB be substituted as the entity for appeal in view of the unusual circumstances. Alternatively, the Chief ALJ noted that the Secretary could invoke the "rule of necessity" to instruct the Chief ALJ to entertain the appeal. *Id.* The Secretary adopted the Chief ALJ's recommendation to refer the matter to the ARB, ***In the Matter of Slavin***, 2002-SWD-1 (Sec'y Aug. 19, 2002). The matter is pending before the ARB at the time of the drafting of this casenote.

[Nuclear & Environmental Whistleblower Digest VII C 1]
SUMMARY JUDGMENT; FAILURE OF COMPLAINANT TO COUNTER RESPONDENT'S AFFIDAVITS AS TO ESSENTIAL ELEMENT OF PROOF ON CAUSATION

In ***Parker v. Tennessee Valley Authority***, ARB No. 99-123, ALJ No. 1999-ERA-13 (ARB June 27, 2002), the ARB affirmed the ALJ's grant of Respondent TVA's motion for summary judgment where Respondent presented affidavits establishing that Complainant was laid off by his employer (a contractor for a TVA outage) pursuant to an "Order of Value," which was a system used by the employer for determining the order of layoff. Respondent's affidavits also established that the "Order of Value" was established prior to Complainant's alleged protected activity. In response to Respondent's motion for summary judgment, Complainant failed to adduce evidence showing that Respondent played any role in the creation of the Order of Value or the decision to lay him off. The Board wrote:

> As a consequence, we find that the material facts as to the creation of the Order of Value are not in dispute, and determine that Parker has failed to set forth proof as to essential elements of his case, to wit, (1) that TVA took an adverse action against him, and (2) that his protected activity motivated the adverse action. 'A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.' *Celotex Corp.*, 477 U.S. at 323.

[Nuclear & Environmental Whistleblower Digest VII D 4]
RECUSAL; REQUIREMENT OF AFFIDAVIT IN SUPPORT

In ***Hasan v. Wolf Creek Nuclear Operating Corp.***, 2002-ERA-29 (ALJ July 8, 2002), the ALJ detailed legal authority to the effect that when an ALJ is faced with an allegation of bias or prejudice that is not accompanied by a legally sufficient affidavit, the ALJ is not obligated to recuse himself from the case. The ALJ went on to consider the merits of Complainant's motion to recuse as Complainant was proceeding *pro se*.

See also ***In the Matter of Slavin***, 2002-SWD-1 (ALJ July 2, 2002) (declining to entertain motion to recuse filed without affidavit); ***In the Matter of Slavin***, 2002-SWD-1 (ALJ July 26, 2002) (containing discussion of why affidavit is required).

VIII. Powers,responsibilities and jurisdiction of ALJ, Secretary and federal courts

[Nuclear & Environmental Whistleblower Digest VIII A 5]
RECUSAL; OALJ'S IGNORING OF COMPLAINANT'S REQUEST TO SELECT ALJ WHO HAD NEVER HAD COMPLAINANT APPEAR BEFORE HIM IN THE PAST

In ***Hasan v. Wolf Creek Nuclear Operating Corp.***, 2002-ERA-29 (ALJ July 8, 2002), Complainant filed with the Chief ALJ a motion to recuse the presiding ALJ because OALJ had assigned that judge to the case, ignoring Complainant's request when the hearing request was made to assign a judge, "who has never been involved in [Complainant's] prior ERA cases." The Chief ALJ referred the motion to the presiding ALJ.

The presiding ALJ declined to recuse himself because the Complainant had not demonstrated any facts which would tend to show bias or prejudice, personal or otherwise, against him or in favor of an adverse party. The ALJ also noted that a motion to recuse may not properly be used for judge-shopping.

[Nuclear & Environmental Whistleblower Digest VIII B 1 6]
REQUEST FOR ARB REVIEW; EQUITABLE GROUNDS FOR EXCUSING UNTIMELY FILING

In ***Dumaw v. International Brotherhood of Teamsters, Local 690***, ARB No. 02-099, ALJ No. 2001-ERA-6 (ARB Aug. 27, 2002), the ARB found that a busy schedule and an ankle injury by one of Complainant's attorneys did not present equitable grounds for waiving the time period for filing a petition for review before the ARB. The ARB observed in this regard that "all that was required of counsel to protect Dumaw's right to appeal was a one-line letter indicating his intent to appeal the ALJ's Recommended Decision and Order." To the extent that the failure to file timely may have been based on Counsels' simply overlooking the due date, the ARB noted that it had recently held that clerical errors in docketing due dates do not constitute "extraordinary circumstances." *Citing Howlett v. Northeast Utilities/Northeast Nuclear Energy Corp.*, ARB No. 99-044, ALJ No. 1999-ERA-1 (ARB Mar. 13, 2001). The ARB found that, ultimately, clients are responsible for the omissions of their representatives.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEALS DISFAVORED; ALJ'S PROCEDURAL ORDERS

In ***Hasan v. J.A. Jones Management Services, Inc.***, ARB No. 02-096, ALJ No. 2002-ERA-18 (ARB July 16, 2002), the ARB applied its policy of disfavoring interlocutory appeals to deny

Complainant's "emergency" appeals of ALJ orders denying a motion to amend the complaint, denying a motion to compel and denying a request for a continuance, where Complainant merely argued that the ALJ's orders were in error. The ARB wrote: "Hasan has perfected his objections to the ALJ's orders. If, after the ALJ issues a recommended decision and order, Hasan wishes to appeal such order, he may then raise all of his objections to the order, thus avoiding the piecemeal litigation of this case."

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEALS DISFAVORED; ALJ'S DENIAL OF MOTION TO RECUSE

In ***Greene v. Environmental Protection Agency***, ARB No. 02-050, ALJ No. 2002-SWD-1 (ARB Sept. 18, 2002), the ARB declined to entertain an interlocutory appeal on the presiding ALJ's denial of a motion for recusal. The ARB noted that disqualification issues are reviewable on appeal from a final judgment, and therefore did not fall within the "collateral order exception" to deferral of appellate review until the whole case is adjudicated.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEALS DISFAVORED; ALJ'S DISCOVERY ORDERS

In ***Puckett v. Tennessee Valley Authority***, ARB No. 02-070, ALJ No. 2002-ERA-15 (ARB Sept. 26, 2002), the ARB declined to entertain an interlocutory appeal requesting that the ARB review all of the ALJ's discovery orders. The ARB wrote that if Complainant "believes that the ALJ's discovery orders constituted an abuse of discretion that prejudiced his case, he may so argue on appeal, if and at such time as, the ALJ issues a recommended decision and order denying his claim." In Puckett, the ARB pointed out that in Greene, it had held that "the Board's policy against interlocutory appeals incorporates 29 U.S.C.A. § 1291's final decision requirement, which provides that the courts of appeals have jurisdiction 'from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." According to the ARB, "[p]ursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' *Catlin v. United States*, 324 U.S. 229, 233 (1945)." The ARB wrote that "[w]hile ALJs in environmental whistleblower cases issue recommended, rather than final decisions, the ALJ, who presides over the hearing phase of the litigation, is entitled to the same opportunity to issue independent decisions as a district court judge." The ARB also considered whether the instant appeal fell within the collateral order exception, and finding that discovery orders are readily subject to review on appeal, found that they generally do not qualify as appealable collateral orders.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEALS; CERTIFICATION REQUIREMENT

In ***Hasan v. J.A. Jones Management Services, Inc.***, ARB No. 02-096, ALJ No. 2002-ERA-18 (ARB July 16, 2002), ***Greene v. Environmental Protection Agency***, ARB No. 02-050, ALJ No. 2002-SWD-1 (ARB Sept. 18, 2002), and ***Puckett v. Tennessee Valley Authority***, ARB No. 02-070, ALJ No. 2002-ERA-15 (ARB Sept. 26, 2002), the ARB stated that the ALJ should follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993) for certifying interlocutory questions for appeal. In each of the cases, the ARB observed that the ALJs involved had not certified questions of law for the ARB's review, but did not reach the issue of whether the failure to obtain a certification from the ALJ was fatal to the interlocutory appeals. Rather, each case was decided based on the ARB's policy disfavoring interlocutory appeals.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEALS; REQUIREMENT OF CERTIFICATION BY ALJ

In ***Dempsey v. Fluor Daniel, Inc.***, ARB No. 01-075, ALJ No. 2001-CAA-5 (ARB May 7, 2002), at the beginning of the hearing counsel for both the Complainant and the Respondent informed the ALJ that because the Regional Administrator had dismissed the complaint on the ground that the Complainant was not Respondent's employee, both counsel were prepared to litigate only the employer-employee issue. The ALJ, although having expected the hearing to include the merits of all issues, permitted the hearing to be limited to this issue when it became clear that the neither side was ready to litigate the other issues. The ALJ thereafter found that Complainant was an employee, and recommended a remand for an investigation into the other issues in the case; the ALJ included in this order a Notice of Appeal Rights. Respondent then filed a petition for review with the ARB. The ARB concluded that this was an interlocutory appeal, and ordered Respondent to show cause why the Board should not dismiss its petition for review and remand the case to the ALJ to complete the adjudication.

In deciding whether to grant an interlocutory appeal, the ARB first held that the ALJ's actions in permitting the parties to bifurcate the hearing (albeit reluctantly) and appending the Notice of Appeal Rights to the decision on the employee issue, were tantamount to a certification of the issue (certification being required by the Secretary's decision in *Plumley, v. Federal Bureau of Prisons*, 1986-CAA-6, slip op. at 2 (Sec'y April 29, 1987)).

The ARB, however, nonetheless declined to hear the appeal, holding:

> This case involves neither the number of complainants and novel threshold issues, nor the length of litigation involved in [*OFCCP v.*] *Honeywell*[*, Inc.*, No. 1977-OFC-3 (Sec'y June 2, 1993)] in which the Secretary had accepted an interlocutory appeal in an case that had been pending for more than ten years]. Furthermore, Fluor Daniel has identified no threshold legal issues, the resolution of which, would encourage the parties to engage in voluntary mediation. Essentially Fluor Daniel argues that we should consider the appeal because if we reverse the ALJ's coverage finding, the case will be concluded. However, in most cases in which a party files an interlocutory appeal of a non-procedural issue, resolution of the issue appealed would resolve the case. Nevertheless, this fact alone has not been considered a sufficient basis upon which to depart from the general rule that interlocutory appeals are disfavored.

(footnote omitted).
[Nuclear & Environmental Whistleblower Digest VIII B 8]
LAW OF THE CASE AS A DISCRETIONARY DOCTRINE

In ***Ruud v. Westinghouse Hanford Co.***, ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33 (ARB Apr. 18, 2002), the ARB held that it was "not bound by the 'law of the case' doctrine, which is discretionary and does not limit our power to reconsider our decision prior to final judgment if we determine that our earlier ruling was erroneous." (Citations omitted). In ***Ruud***, the ARB decided to reverse its earlier rejection of a settlement agreement.

[Nuclear & Environmental Whistleblower Digest VIII C 2 c]
REVIEWABLE FINAL AGENCY ACTION; *KYNE* EXCEPTION; COLLATERAL ORDER DOCTRINE

In ***Exxon Chemicals America v. Chao***, No. 00-60569 (5th Cir. July 30, 2002) (case below 1993-ERA-6), the Fifth Circuit determined that an ARB remand order to the presiding ALJ is not a reviewable final agency action. In this regard, the court found that (1) the ARB had not issued a decision definitively resolving the merits of the case; (2) the ARB's remand order did not have a substantial effect on the Respondent's rights such that they cannot be altered by subsequent action by the ARB; and (3) Respondent may ultimately prevail in front of the ARB, mooting any current challenge to the ARB's findings.

Respondent alternatively asserted that the Fifth Circuit had authority to review the remand order pursuant to the exception to the final agency action rule set forth in *Leedom v. Kyne*, 358 U.S. 184 (1958) or under the collateral order doctrine. The court noted that "the focus of the *Kyne* exception is whether 'an agency exceeds the scope of its delegated authority or violates a clear statutory mandate.'" Respondent conceded that the Secretary could remand a case to the ALJ, but argued that the ARB had not been delegated this power. The court, however, ruled that the ARB's "remand power is procedural in nature, and therefore is within the scope of this delegation of authority." The court held that even if the ARB exceeded its delegated authority by remanding the case, it still did not have jurisdiction to review that decision under *Kyne* because the Respondent could obtain meaningful judicial review of the ARB's decision after this case ultimately is decided on the merits.

The Respondent argued that the collateral order doctrine applied because "the invalidity of the ARB's remand order is effectively unreviewable on appeal from a subsequent final decision." The court dismissed this argument, writing: "If the ARB rules against Exxon, Exxon will have an adequate opportunity to challenge both the ARB's final decision, as well as the propriety of its remand order."

IX. Miscellaneous procedural issues

[Nuclear & Environmental Whistleblower Digest IX D 3]
RECONSIDERATION OF FINAL ORDER; AUTHORITY AND STANDARD

In ***Macktal v. U.S. Dept. of Labor***, No. 01-60195 (5th Cir. Apr. 8, 2002) (case below ARB No. 98-112, ALJ No. 1986-ERA-23), the Fifth Circuit held that the ARB correctly concluded that it had the inherent authority to reconsider a decision under the whistleblower provision of the ERA. The court noted that "[i]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." The court noted that the ERA does not contain any limitation on discretionary review.

In regard to reviewing an agency's decision to reconsider, the court wrote:

> The reasonableness of an agency's reconsideration implicates two opposing policies: "the desirability of finality on one hand and the public's interest in reaching what, ultimately, appears to be the right result on the other." *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316, 321, 81 S.Ct. 1611, 1617 (1961). An agency's inherent authority to reconsider its decisions is not unlimited. An agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

> Reconsideration must also occur within a reasonable time after the first decision, and notice of the agency's intent to reconsider must be given to the parties. *See Dun & Bradstreet Corp.*, 964 F.2d at 193; *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972).

Applying this standard, the court ruled that the ARB properly reconsidered a decision that was based on failure of the Respondent to file a brief when the Respondent presented evidence that the brief had been timely filed, but with the Benefits Review Board rather than the ARB.

[Nuclear & Environmental Whistleblower Digest IX M 2]
DISQUALIFICATION OF COUNSEL; APPEAL PROCEDURE WHERE CHIEF ALJ MUST RECUSE

See ***Greene v. U.S. Environmental Protection Agency***, 2002-SWD-1 (ALJ June 20, 2002), *supra* at VII A 5.

[Nuclear & Environmental Whistleblower Digest IX M 2]
DISQUALIFICATION OF COUNSEL; ABUSIVE AND FALSE STATEMENTS; FLOUTING OF ALJ'S ORDER ON CORRECT CITATION OF DECISIONS

In ***Greene v. U.S. Environmental Protection Agency***, 2002-SWD-1 (ALJ June 20, 2002), the presiding ALJ disqualified counsel for Complainant where counsel had made insulting, abusive, unprofessional, and false statements, and had failed to comply with an order to end the incorporation of inappropriate and uncivil language in pleadings, to refrain from string citations unless necessary to articulate different aspects of the contention, and to provide pinpoint citations and synopses of rulings cited. Specifically, counsel had alleged that DOL OALJ and the presiding judge had engaged in improper conduct regarding the judge's appointment. The ALJ found that counsel had reason to know that the allegation was false when it was made. In addition, in pleadings filed with the judge, counsel had made statements such as that the presiding judge was "incurious and unscholarly," had made rulings that were "nasty, brutish, and short (and bordering dangerously on bullying)," that the presiding judge's agency stood to gain financially if the judge stinted on the time spent on the case, that the judge was a "cat's paw" for other federal agencies, etc. Finally, counsel continued to cite cases out of conformance with the ALJ's order. In the order of disqualification the ALJ illustrated with examples from counsel's filings why such citations were often not relevant to the issues in the instant proceeding, and why it was a waste of judicial resources to check improperly cited decisions.

The ALJ found that counsel's conduct violated 29 C.F.R. §§ 18.34(g)(3) and 18.36, the ABA's Model Rules of Professional Conduct, and the rules of professional conduct adopted by the Supreme Court of Tennessee before which counsel was licensed. Given counsel's history of unprofessional conduct in other cases, the ALJ found that disqualification was the appropriate sanction.

[Editor's note: At the time of the writing of this casenote, the order of disqualification is under appeal]

[Nuclear & Environmental Whistleblower Digest IX M 2]
BRIEFS; GRATUITOUS DISPARAGEMENT OF ALJ DOES NOT SERVE CLIENT'S INTERESTS

In ***Puckett v. Tennessee Valley Authority***, ARB No. 02-070, ALJ No. 2002-ERA-15 (ARB

Sept. 26, 2002), Respondent moved to strike Complainant's brief because it contained "scandalous, disparaging, and impertinent remarks" about the ALJ. The ARB found that Complainant's argument was "on the razor's edge of acceptability" but was not of the same degree of "immaterial, offensive excoriation" for which it had sanctioned Complainant's counsel in *Pickett v. TVA*, ARB No. 00-076, ALJ No. 1999-CAA-25 (ARB Nov. 2, 2000). The Board, however, quoted from *Pickett*, to reiterate that such an approach in a brief does not serve the interests of a client.

XI. Burden of proof and production

[Nuclear & Environmental Whistleblower Digest XI]
STANDARD OF PROOF IN POST-1992 AMENDMENT ERA CASES

In ***Bourland v. Burns International Security Services***, ARB No. 99-124, ALJ No. 1998-ERA-32 (ARB Apr. 30, 2002), Complainant argued on appeal to the ARB that the ALJ's use of the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) test in regard to a post-1992 ERA whistleblower case was in error and had the effect of allowing Respondent to articulate a legitimate reason for the suspension, thereby wiping out inferences to which Complainant was entitled, and thus preventing Respondent from having to bear its clear and convincing burden under 42 U.S.C.A. § 5851(b)(3)(D). The ARB found no authority supporting this argument, and rejected it. The ARB, however, indicated that the standard of proof for post-1992 amendment ERA whistleblower cases is as follows:

> The ERA requires a complainant to "demonstrate" that his protected behavior was a contributing factor in the unfavorable personnel action that followed. 42 U.S.C.A. § 5851 (b)(3)(C). "Demonstrate," in this context, means to prove by a preponderance of the evidence. *Dysert v. Florida Power Corp.*, 93-ERA-21, slip op. at 3 (Sec'y Aug.7, 1995), *aff'd sub nom. Dysert v. U. S. Secretary of Labor*, 105 F. 3d 607, 609-10 (11th Cir. 1997); *Trimmer v. U. S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Stone & Webster Engineering Corp. v. Herman*, 115 F. 3d 1568, 1572 (11th Cir. 1997).

Since the Complainant did not meet this statutory requirement, he could not prevail.

[Nuclear & Environmental Whistleblower Digest XI A 2 c]
RESPONDENT'S KNOWLEDGE; COMPLAINANT ERRONEOUSLY BLAMED FOR FILING SAFETY COMPLAINT

In ***Evans v. Baby-Tenda***, 2001-CAA-4 (ALJ Sept. 30, 2002), Respondent terminated Complainant's employment not only for her protected actions, but in part on the mistaken belief that she had also taken actions that actually had been taken by another employee. The ALJ held that:

> I am of the opinion that the CAA whistleblower protections must extend to persons erroneously believed to have filed complaints. If an employer is free to fire anyone other than the complainant [who actually engaged in the protected activity], then that employer is free to eviscerate the CAA. In fact, taking adverse actions against coworkers, whether intentional or unintentional, may be more effective than retaliating only against the complainant because it encourages fellow employees to turn on the complainant to protect their own jobs. Whistleblower statutes are premised on the fact that some employees may

> hesitate to complain of safety and health issues for fear of retaliation. Even greater is that fear when the employee believes that retaliation will follow if any employee complains. The protection of the CAA must shield employees from both intentional or unintentional adverse actions, because in either case, such retaliation chills the interest of employees to exercise their rights. As such, the Respondent acted adversely to the Complainant with the clear intent of chilling the exercise of her rights under the CAA.

The ALJ cited in this regard, *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1188-1189 (1st Cir. 1994). (section 11(c) OSHA case in which coworker was fired for being a friend of the worker who filed a complaint with OSHA).

[Nuclear & Environmental Whistleblower Digest XI C 1]
PRETEXT; COMPLAINANT MUST ESTABLISH MORE THAN THAT THE JOB ACTION WAS UNJUST, UNFAIR OR INSENSIBLE -- IT MUST BE SHOWN TO BE A PHONY REASON

In ***Gale v. Ocean Imaging***, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002), the Complainant argued that "it was wrong, unfair, or unjust for Respondents not to weigh the grounds that they cited against Complainant's past performance and find in favor of retaining her, and that therefore Respondents' rationale was pretext." The ARB rejected this argument, however, quoting the Seventh Circuit: "[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" USDOL/OALJ Reporter (HTML) at 8, quoting *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), citing *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994).

[Nuclear & Environmental Whistleblower Digest XI C 1 b]
PRETEXT; ABSENCE OF PRIOR DISCIPLINE; ERA WHISTLEBLOWER PROVISION IS A DISCRIMINATION STATUTE, NOT A PERSONNEL MANUAL

In ***Gale v. Ocean Imaging***, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002), the ALJ had found Respondent's articulated reasons for discharging Complainant to be insignificant, and therefore pretextual, in large part because Complainant had not been disciplined prior to her termination. The ARB reviewed the evidence of record, and came to the opposite conclusion, largely because each of the instances of conduct alleged by Respondent to have led to Complainant's discharge did occur. In regard to the lack of prior discipline, the ARB wrote:

> The absence of disciplinary action against Complainant prior to her protected activity does not establish that Respondents' alleged reasons for her discharge were pretextual. Ventura testified without contradiction that Gale was terminated under the same process as any other employee and that Respondent did not have a policy requiring it to bring decrements in an employee's performance to the employee's attention. T. 197. The ALJ's contention that the absence of prior disciplinary acts showed pretext assumes that Respondent had to take other disciplinary measures before dismissing Complainant. There was no evidence that Respondent had a policy or practice of progressive discipline, under which it imposed lesser sanctions prior to terminating employment, nor does the ERA require Respondents to have had such a policy or practice. Similarly, Respondents' failure to weigh the favorable comment of a patient in August against the earlier comment on Gale's rudeness, made by a different patient in March, does not establish pretext. "We [courts] do not sit as a super-personnel

department that reexamines an entity's business decisions." *Morrow v. Wal-Mart Stores, Inc*. 152 F.3d 559, 564 (7th Cir. 1998). Section 5851 of Title 42 of the U.S. Code is a discrimination statute, not a code of sound personnel management.

XII. Protected activity

[Nuclear & Environmental Whistleblower Digest XII D 1 d]
PROTECTED ACTIVITY; GOVERNMENT OFFICIAL WORKING WITHIN THE SCOPE OF HIS OR HER DUTIES; GOVERNMENT OFFICIAL WHO TAKES CONCERNS OUTSIDE THE CHAIN OF COMMAND

In ***Sasse v. U.S. Department of Justice***, 1998-CAA-7 (ALJ May 8, 2002), Complainant was an attorney with the U.S. Department of Justice who filed an whistleblower complaint based, *inter alia*, on Complainant's belief that he was subjected to harassment and discrimination by various levels of his DOJ supervisors, who were not only unsupportive, but also abusive to him, and made a conscious effort not to prosecute certain environmental crimes that he believed should be prosecuted. The ALJ's recommended decision, however, adopted Respondent's position that work performed by a government official within the scope of his job description cannot be found to be protected activity. Citing by analogy to a case arising under the Whistleblower Protection Act, the ALJ wrote:

> In *Huffman v. OPM*, 2001 WL 914869 (Fed. Cir. Aug. 15, 2001), the Federal Circuit Court addressed the issue of whether a complainant engaged in protected activity while carrying out assigned work assignments through normal channels. Although the Court was interpreting the Whistleblower Protection Act (WPA), 5 U.S.C.§ 2302, Respondent urges that its findings should be adopted here. The case stands for the propositions that "mere performance" of "required everyday job responsibilities" is not protected disclosure, and an employee "cannot be said to have risked his personal job security by merely performing his required duties ... [A]ll government employees are expected to perform their required everyday job responsibilities pursuant to the fiduciary obligation which every employee owes his employer." *Id*. at 6, *quoting Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1143, 1144 (Fed Cir. 1998). *See also Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995). The court held that "reporting in connection with assigned normal duties is not a protected disclosure covered by the Act." Id. *See also, Langer v. Dep't of Treasury*, 2001 WL 1090206 (Fed. Cir. Sept. 19, 2001).

The ALJ, however, found that Complainant could claim protected activity if he proved that he had gone outside the chain of command in reporting suspected problems. Thus, the ALJ found that Complainant was engaged in protected activity when he was contacted by a Congressman's office on a matter concerning a case he was working on relating to an airport expansion project, and during that contact voiced his concerns about toxic conditions at the area of the proposed expansion.

XIII. Adverse action

[Nuclear & Environmental Whistleblower Digest XIII B 8]
REFUSAL TO HIRE; EMPLOYER AWARE OF PROTECTED ACTIVITY ELEMENT

In ***Hasan v. USDOL***, No. 01-9521 (10th Cir. Apr. 26, 2002) (case below 2000-ERA-14), the

Tenth Circuit ruled that, to meet the "employer aware of the conduct" element of a prima facie case under 42 U.S.C. § 5851(b)(3), where the complaint is based on refusal to hire, it is sufficient to show that the Complainant's application letter included a statement setting forth his prior whistleblowing activities. It is not necessary to also allege that the official in charge of hiring saw the letter.

[Nuclear & Environmental Whistleblower Digest XIII B 8]
REFUSAL TO HIRE; "GATEKEEPING" ELEMENTS FOR AN ERA COMPLAINT

In ***Hasan v. USDOL***, No. 01-9521 (10th Cir. Apr. 26, 2002) (case below 2000-ERA-14), the Tenth Circuit recited the ARB's test for the "gatekeeping" elements of a refusal to hire case:

> To determine whether Mr. Hasan could proceed beyond the § 5851(b)(3) barrier, the ARB examined whether (1) he "engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action." ... The third element is subdivided into three prongs. The complainant "must allege: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position remained open and the employer continued to seek applicants with his qualifications."

(footnote and citations omitted). The court, however, observed in a footnote:

> Mr. Hasan does not challenge the Secretary's delineation of the elements of a prima facie case. We are concerned, however, that the Secretary's articulation of the third prong is too limited. *See Amro v. Boeing Co.*, 232 F.3d 790, 796 &n.2 (10th Cir. 2000) (clarifying that plaintiff may establish this element in a number of ways including that position for which he was not hired was *filled or remained open* following rejection of the plaintiff's application). In our discussion, we address both possibilities.

Slip op. at n.3 (emphasis in original). The court affirmed the ALJ and the ARB because:

> The record shows that Mr. Hasan applied for any senior civil/structural engineering position at any salary in any location for which he was qualified. Mr. Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him. He merely made the conclusory statement that a company the size of respondent's always has positions open. This statement is insufficient to establish the third prong.

[Nuclear & Environmental Whistleblower Digest XIII B 18]
ADVERSE EMPLOYMENT ACTION; THREATENED TERMINATION FROM EMPLOYMENT

In ***Kelly v. Lambda Research, Inc.***, 2000-ERA-35 (ALJ Apr. 26, 2002), the ALJ recommended a finding that a threatened termination from employment was sufficient to constitute adverse employment action. The ALJ cited in this regard the recommended decision of the ALJ in *Graf v. Wackenhut Services, LLC*, 1998-ERA-37 (ALJ Dec. 16, 1999), *pet. for review withdrawn*, ARB Nos. 00-024 and 25 (ARB Feb. 1998).

[Editor's note: The significant point of this ruling is that it does not require a showing of an actual adverse impact on the "terms and conditions" of employment.]

XVI. Damages and remedies

[Nuclear & Environmental Whistleblower Digest XVI D 4 a]
COMPENSATORY DAMAGES; ; SETTING AMOUNT BASED ON COMPARATIVE AWARDS AND CIRCUMSTANCES OF THE CASE

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2, 2001-CAA-9 and 13, 2002-CAA-3 and 18 (ALJ Sept. 24, 2002), the ALJ reviewed the amount and circumstances of compensatory damage awards in other cases, and the circumstances of the instant case, to set recommended compensatory damages at $50,000. The ALJ found:

> In this case, Respondents' left Complainant to suffer the lingering doubt, of whether the OIG investigation would result in a loss of liberty and/or means of economic support, from May 15, 1996, to October 2, 1998. Respondent EPA also permanently transferred Complainant out of her career field, subjected her to a hostile working environment, and allowed her to suffer in a position that she was not fully qualified to perform while she attempted to manage personnel who refused to work with her. Complainant's psychiatrist causally connected Complainant's stress to Respondent EPA's retaliatory activities and Complainant testified as to how the stress adversely affected her health.

See also Hall v. U.S. Army, Dugway Proving Ground, 1997-SDW-5 (ALJ Aug. 8, 2002) (recommending an award of $450,000.00 representing mental anguish and emotional distress, adverse physical health consequence, and loss of professional reputation); *Evans v. Baby-Tenda*, 2001-CAA-4 (ALJ Sept. 30, 2002) (recommending an award of $25,000 where Complainant suyffered physically, mentally and emotionally as a result of the retaliation).

[Nuclear & Environmental Whistleblower Digest XVI E 1]
ATTORNEY FEES; STANDING OF COUNSEL TO FILE PETITION

In ***McQuade v. Oak Ridge Operations Office, USDOE***, 1999-CAA-7, 8, 9 and 10 (ALJ June 18, 2002), the ALJ held in a recommended decision on attorney fees that an attorney who had been discharged by Complainants as counsel did not have standing to request an award of attorney fees where Complainants had not requested an award of attorney fees and affirmatively opposed an award of fees to the former counsel. The ALJ cited the following statutory language from the CAA, the SDWA and the TSCA in regard to standing to request fees:

> If an order is issued under this paragraph, the Secretary, *at the request of the complainant*, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.
>
> 42 U.S.C. §7622(b)(2)(B); 42 U.S.C. §300j-9(i)(2)(B)(ii); 15 U.S.C. §2622(b)(2)(B) (italics supplied).

The ALJ noted that similar language existed under the CERCLA, the SWDA and the WPCA, and concluded that the statutes only permitted the "complainant" or "applicant" to be awarded reasonable attorney fees and costs.

The ALJ also reviewed authority under 42 U.S.C. § 1988 and other similar law, and concluding that the attorney fee mechanism established by the employee protection provisions of the environmental statutes are indistinguishable from the provisions of section 1988, held that "attorney's fees and costs under the environmental statutes may only be awarded at the request and in the name of complainants as the real parties in interest." *Citing Brown v. General Motors Corp*., 722 F.2d 1009 (2d Cir. 1983), and other authority.

[Nuclear & Environmental Whistleblower Digest XVI F]
EXEMPLARY DAMAGES; SETTING AMOUNT BASED ON COMPARATIVE AWARDS AND CIRCUMSTANCES OF THE CASE

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2, 2001-CAA-9 and 13, 2002-CAA-3 and 18 (ALJ Sept. 24, 2002), the ALJ recommended an award of $250,000 in exemplary damages based on a review of other exemplary damage awards and the circumstances of the instant case. The ALJ took into account Respondent's conduct in not disclosing the results of an OIG investigation of Complainant to Complainant (the OIG had found no grounds for criminal prosecution or administrative discipline), in permanently transferring Complainant out of her career field, in subjecting her to a hostile working environment, and in allowing her to suffer in a position that she was not fully qualified to perform while she attempted to manage personnel who refused to work with her. The ALJ also took into account that Respondents' behavior took place over a long period of time.

See also Hall v. U.S. Army, Dugway Proving Ground, 1997-SDW-5 (ALJ Aug. 8, 2002) (recommending an award of $300,000.00 as exemplary damages where the ALJ found that the case involved an egregious and blatant conspiracy against Complainant that lasted about 10 years); *Evans v. Baby-Tenda*, 2001-CAA-4 (ALJ Sept. 30, 2002) (recommending an award of $20,000 where *inter alia*, retaliation extended over a 6 month period; Respondent had another employee (then Complainant's boyfriend) steal Complainant's mail, had fellow employees monitor Complainant, isolated Complainant's work area, offered money to workers who could prove that Complainant filed the complaint with OSHA, cut Complainant's Christmas bonus in half and ultimately fired her).

XVII. Settlements

[Nuclear & Environmental Whistleblower Digest XVII G 5]
SETTLEMENT; ALLEGED BREACH AS GROUNDS FOR DISAPPROVAL

In ***Ruud v. Westinghouse Hanford Co.***, ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33 (ARB Apr. 18, 2002), the ARB recited the lengthy procedural history of the case. Although too complex to relate adequately in a casenote, in essence, the ALJ who originally received a settlement agreement in the matter in 1988 granted the parties' joint stipulation to dismiss the complaint with prejudice, which was based on an underlying settlement agreement. Under the regulations in force at the time, however, the ALJ should have issued a recommendation on whether to approve the settlement and forwarded the matter to the Secretary for a final decision. The ALJ's order was not forwarded to the Secretary until 1990. The parties resisted providing a copy of the settlement agreement, so in 1994 the matter was remanded for a hearing on the merits. On remand the case was assigned to a different ALJ, who conducted a

hearing. In 1996, the new ALJ recommended approval of the original settlement agreement, but found in the alternative in favor of the Complainant on the merits.

Upon review of the matter following remand, the ARB in 1997 disapproved the 1988 settlement agreement based on a finding that Respondent had breached a material term of the settlement agreement by interfering with the Complainant's prospective employment, and based on a finding that there had been a mutual misunderstanding regarding a material clause of the settlement agreement which prevented the parties from reaching an agreement. The ARB remanded the case for additional findings on the merits.

In the meantime, several related actions in other state and federal courts were resolved, and the parties took differing positions on the impact of those dispositions on the DOL proceeding. In addition, rather than offering evidence on the issue for which the ARB remanded the case, Respondent argued, *inter alia*, that it could not be held responsible for the Board's conclusion that agreement had been breached. Complainant argued, *inter alia*, that reconsideration of the settlement agreement was not within the ALJ's mandate on remand. The ALJ found that he could not revisit the settlement agreement, and in a 1998 recommended decision, made findings on reinstatement and damages.

When the ARB issued its present order in 2002, it determined that its 1997 ruling rejecting the settlement agreement was in error. First, the ARB held that "the issue of whether or not a settlement agreement has been breached is not a matter for the Board to determine," noting in this regard decisions rendered after the ARB's 1997 remand decision holding that the Secretary does not have the authority to enforce settlement agreements. The ARB also held that "[s]uch an approach also is more consistent with prior cases of the Secretary and the Board which have held that breach of a settlement agreement is not a basis to disapprove or rescind a settlement." (citations omitted). The Board also noted that "in decisions issued subsequent to the Board's 1997 *Ruud* decision, we have rejected efforts to void settlements based upon claims of breach." (citations omitted).

Second, the Board re-accessed the record in regard to whether there was a misunderstanding regarding a material term of the settlement agreement, and concluded that its 1997 remand decision was in error on this point.

Accordingly, the ARB ruled that it would hold the parties to the terms of their 1988 settlement agreement and approve the agreement.

[Nuclear & Environmental Whistleblower Digest XVII G 9]
SETTLEMENT; ARB DECLINES TO APPROVE AMENDMENT TO SETTLEMENT WHERE IT HAD ALREADY ENTERED A FINAL ORDER APPROVING THE SETTLEMENT AND DISMISSING THE CASE WITH PREJUDICE

In ***Coffman v. Alyeska Pipeline Service Co.***, ARB No. 02-026, ALJ Nos. 1996-TSC-5 and 6 (ARB July 30, 2002), the parties filed with the ARB a Joint Motion to Approve Settlement Agreement in which Complainant and Respondents requested the Board to approve a modification to the settlement which the Board previously approved. The ARB ordered the parties to show cause why the Board had authority to approve such an amendment. Although the parties filed a statement indicating that they disagreed with the ARB's questioning of its authority in the matter, they provided no legal analysis to support that statement. The ARB, thus dismissed the matter, writing "[t]he parties have failed to demonstrate a basis upon which the Board has authority to amend a settlement once the Board has entered a final order

approving the settlement and dismissing the matter with prejudice...."

XVIII. Dismissals

[Nuclear & Environmental Whistleblower Digest XVIII C 4]
DISMISSAL FOR CAUSE; FAILURE TO ATTEND HEARING OR RESPOND TO ORDER TO SHOW CAUSE

In ***Steiner v. The City of Canton***, 2001-WPC-1 (ALJ Jan. 7, 2002), a copy of the notice of hearing served on the Complainant by certified mail, return receipt requested, was returned as unclaimed by the U.S. Postal Service after three attempts at delivery. A second copy of the notice was sent by regular and certified mail. The certified mail was again unclaimed, but the regular mail copy was not returned as undeliverable. The Complainant did not show up the hearing. The ALJ issued an order to show cause by regular and certified mail, and again the certified mail was not claimed but the regular mail was not returned as undeliverable. Complainant did not respond to the order to show cause, and the ALJ recommended dismissal of the case with prejudice.

[Nuclear & Environmental Whistleblower Digest XVIII C 8]
DISMISSAL; FAILURE TO PROSECUTE; FIVE FACTOR TEST

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 00-082, ALJ No. 2000-ERA-23 (ARB Aug. 30, 2002), Complainant wrote to the Chief ALJ in 2000 requesting a report on the status of a case he had purportedly filed seven years earlier. Although the OALJ had no record of a hearing request, Complainant produced a fax transmission confirmation sheet bearing the number of the OALJ administrative offices rather than the Docket section. The Associate Chief ALJ accepted the fax confirmation sheet as adequate proof of filing and therefore accepted the case as docketed for hearing. The Respondent thereafter filed a motion with the assigned presiding ALJ to dismiss for want of prosecution. The ALJ granted the motion. In the hearing before the ALJ on the motion to dismiss, Complainant explained that although he had filed another hearing request with DOL OALJ near to the time of instant hearing request, which case had proceeded to hearing and decision in a timely fashion, he did not view the seven year delay on the instant case as unusual because of his experience with other administrative forums.

On review, the ARB adopted the Second Circuit's test for determining when it is appropriate to dismiss a case for want of prosecution. The ARB quoted *LeSane v. Hall's Security Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001), as to the factors to be considered, noting that none of the factors are individually dispositive:

> [1] the duration of the plaintiff's failures, [2] whether the plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . and [5] whether the judge has adequately assessed the efficacy of lesser sanctions.

Applying this test, the ARB determined, first, that it was significant that seven years had passed from the time the Complainant filed his hearing request until he wrote a letter to the Chief ALJ inquiring into the status of the case -- but also observed that it had not been the Complainant's duty to take any specific action. Rather, it had been incumbent on OALJ to schedule the

hearing and notify the parties of the hearing date. In regard to the second factor, the ARB found that the Complainant had not received any specific notice that inaction would result in a dismissal of the complaint. In regard to the third factor, the ARB noted the Respondent's assertion that some witnesses were beyond the reach of subpoenas, but found that the Respondent had "not identified any specific prejudice to its case should the case proceed." In regard to the fourth factor, the ARB found that the Complainant's case did not add to court calendar congestion since it was not on the calendar, and observed that "[t]his is not a case in which a party has requested serial continuances in an effort to avoid litigating his case, and in the process has wasted the court's time and resources." The ARB did not consider factor five because it held that the Complainant had not been derelict in any duty. In conclusion, the ARB held that "given Reid's pro se status, the fact that there is no evidence in the record that Reid's failure to proceed was an intentional ploy to avoid or prolong litigation, and the fact that Reid was given no warning, we reject the ALJ's recommendation that this case be dismissed for failure to diligently pursue the case."

XX. Relationship between 29 C.F.R. Part 24 and other laws

[Nuclear & Environmental Whistleblower Digest XX D]
COLLECTIVE BARGAINING AGREEMENT; FEDERAL EMPLOYEE; EXCLUSIVENESS OF REMEDY

In ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Sept. 30, 2002) (order granting partial summary decision), the ALJ held that a collective bargaining agreement covering Complainant as a member of the American Federation of Government Employees did not deprive the DOL of jurisdiction in the resolution of Complainant's whistleblowing retaliation grievances. The ALJ reviewed the legislative history of the Civil Service Reform Act of 1978, and concluded that it revealed that the the CSRA's procedures were not meant to be the exclusive remedy for employees asserting claims under the whistleblower protection statutes. The ALJ distinguished several federal court opinions indicating that the grievance procedures of a CBA are the exclusive procedures for resolving claims under federal statutes, on the ground those cases did not present "the exceptional governmental interests and/or public safety concerns" presented by DOL whistleblower adjudications. The ALJ acknowledged that there is strong federal policy favoring arbitration, but cited the equally strong policy in DOL whistleblower adjudications of protecting the public interest. The ALJ cited caselaw that holds that DOL is a party to the settlement of ERA cases.

[Nuclear & Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY

See casenote on ***Federal Maritime Commission v. South Carolina State Ports Authority***, _ US _, 122 S Ct 1864, 152 L Ed 2d 962 (2002), *supra* at Supreme Court summary.

[Nuclear & Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY; DISCRETION OF SECRETARY TO INTERVENE

In ***Rhode Island Department of Environmental Management v. U.S. Dept. of Labor***, Nos. 00-2326, 01-1543 (1st Cir. Aug. 30, 2002) (case below ARB No. 99-118, ALJ Nos. 1998-SWD-3, 1999-SWD-1 and 2), the State of Rhode Island brought suit in the district court seeking to enjoin four separate administrative actions brought under the whistleblower provisions of the SWDA by state employees on the ground that the proceedings infringed upon the state's constitutionally protected sovereign interests. The district court found the state's

arguments convincing, and enjoined the United States Department of Labor and three state agency employees from proceeding in a federal administrative adjudication of the employees' claims.

On appeal, the First Circuit affirmed the lower court's ruling, holding that the recent Supreme Court decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002) "fairly disposes of any argument by the appellants that, as a general proposition, a state's traditional immunity from suit does not extend to administrative proceedings initiated and prosecuted by private citizens." The court, however, made one clarification to the District Court's decision:

> The governing regulations provide that the Secretary may, at any time, intervene in the proceedings before the ALJ as a party or amicus. 29 C.F.R. § 24.6(f)(1). Generally speaking, if the United States joins a suit after it has been initiated by otherwise-barred private parties and seeks the same relief as the private parties, this generally cures any Eleventh Amendment or sovereign immunity defect, and the private parties may continue to participate in the suit. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997), *aff'd,* 526 U.S. 172 (1999); *Seneca Nation of Indians v. New York*, 178 F.3d 95, 97 (2d Cir. 1999) (per curiam). Thus, our holding does not preclude the Secretary from intervening in the enjoined proceedings and removing the sovereign immunity bar. *See Ohio Envtl. Prot. Agency*, 121 F. Supp. 2d at 1167. To the extent the district court's injunction does not permit the Secretary to take such action, we modify the injunction accordingly.[13]
>
> * * *
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> ——————
>
> [13] We also note, in agreement with the district court, that OSHA is not enjoined from receiving complaints, conducting its own investigations on such complaints, and making determinations as to liability under 29 C.F.R. § 24.4(d)(1).

In ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 99-118, ALJ Nos. 1998-SWD-3, 1999-SWD-1 and 2 (ARB Sept. 12, 2002), the ARB, noting that the 1st Circuit had modified the injunction "allow the Secretary of Labor, if she so chooses, to intervene in the proceedings before the ALJ, thereby curing any sovereign immunity bar," (quote from the 1st Cir. decision) ordered the parties to inform the ARB no later than October 10, 2002, how they wished to proceed in the case.

[Nuclear & Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY; DISMISSAL WHERE DOL DOES NOT INTERVENE

The State of Georgia raised the Eleventh Amendment in ***Cannamel v. State of Georgia***, 2002-SWD-2 (ALJ July 26, 2002). Following issuance of the Supreme Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002), Georgia filed a motion to dismiss, and the ALJ issued an Order to Show Cause. The Complainant answered that FMC did not apply because the ALJ was "simply performing an investigative function which results in a report to the Secretary of Labor." The ALJ found that this argument had no merit, and noting that DOL had not intervened, granted the motion to dismiss.

II. Procedure

[STAA Whistleblower Digest II E 5]
MOTION FOR REASSIGNMENT OF ALJ GROUNDED IN MOTION TO RECUSE

In ***Scott v. J.B. Hunt Transport, Inc.***, 2002-STA-1 (ALJ Apr. 19, 2002), the Complainant requested that the Chief ALJ reassign the case to a different ALJ based on the contention that the currently assigned ALJ had shown favoritism toward Respondent. The request was supported by a copy of a motion to recuse and declaration in support of motion earlier filed with the presiding judge. The Chief ALJ denied the motion, holding:

> ...I find that I have no authority to consider a motion for reassignment of the presiding judge in this case grounded in a motion to recuse. Rather, in the normal case, an allegation of judicial misconduct is documented by the motion to recuse and the ALJ's ruling on the motion, which preserves the matter for review by the Administrative Review Board if raised as a ground for appeal.

[STAA Whistleblower Digest VII E 5]
ALJ BIAS; ELEMENTS FOR ESTABLISHING; JUDICIAL RULING ARE PROPER GROUNDS FOR APPEAL, NOT RECUSAL

In ***Germann v. Calmat Co.***, ARB No. 99-114, ALJ No. 1999-STA-15 (ARB Aug. 1, 2002), Respondent requested that the ARB order a new hearing by a different ALJ because of the alleged prejudicial effect on the ALJ in improperly admitting hearsay and irrelevant evidence. Respondent argued that the inadmissible evidence so adversely affected the ALJ's decision-making ability that it was deprived of a fair hearing and decision. The ARB, however, found that the admission of the evidence was harmless error. In addition, it found that the objected to evidence was not so inflammatory as to persuade the ARB that the ALJ had become prejudiced. The ARB then recited the elements necessary for establishing bias:

> A party claiming bias must first overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. [19]96-CAA-8 (ARB Mar. 13, 2001). In this regard, speculation regarding the potential effect that evidence may have had upon the ALJ standing alone cannot overcome the presumed integrity of an ALJ. Second, a party seeking to establish judicial bias must show the existence of a "significant (and often determinative) 'extrajudicial source' factor." *Liteky v. United States*, 510 US 540, 554-555 (1994). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id*. Additionally, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. Judicial rulings are "proper grounds for appeal, not for recusal." *Id*. CalMat asserts evidentiary rulings, not significant extrajudicial factors or favoritism, as its basis for contending judicial bias. Its argument, therefore, would also fail under the *Liteky* criteria.

[STAA Whistleblower Digest II H 4 c]
CLAIMS FOR DAMAGES INCURRED PRIOR TO HEARING BEFORE ALJ CANNOT BE RAISED FOR THE FIRST TIME BEFORE THE ARB

In ***Pettit v. American Concrete Products, Inc.***, ARB No. 00-053, ALJ No. 1999-STA-47 (ARB Aug. 27, 2002), the ARB declined to review Complainant's arguments raising the issue of medical costs incurred because of the interruption of health insurance coverage. The ARB held that "[c]laims for medical costs that had been incurred between the time of the Complainant's termination on March 24, 1999, and the hearing before the ALJ should have been raised and litigated by the Complainant before the ALJ" and that the Complainant could not raise this issue for the first time before the Board on review. The ARB, however, observed that the ALJ's reinstatement order became effective immediately upon receipt by the Complainant, pursuant to Section 1978.109(b), and that "[t]he STAA provides that reinstatement entitles the Complainant 'to the former position with the same pay and terms and privileges of employment.' 49 U.S.C. §31105(b)(3)(A)(ii); *see* 29 C.F.R. § 1978.104(a)."

[STAA Whistleblower Digest II H 4 c]
AFFIRMATIVE DEFENSES MUST BE TIMELY RAISED BEFORE THE ALJ

In ***Pettit v. American Concrete Products, Inc.***, ARB No. 00-053, ALJ No. 1999-STA-47 (ARB Aug. 27, 2002), the ARB rejected Respondent's request to remand for a hearing on the issue of mitigation of the Complainant's damages because failure to mitigate is an affirmative defense that must be timely raised by a respondent, citing *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-30, slip op. at 21-22 and authorities there cited (ARB Feb. 9, 2001) (ERA case). Since the Respondent failed to pursue this issue before the ALJ it could not raise it before the ARB.

[STAA Whistleblower Digest II J]
EVIDENCE; NEGATIVE INFERENCE DRAWN BASED ON FAILURE TO PRODUCE WITNESS

In ***Poll v. R. J. Vyhnalek Trucking***, ARB No. 99-110, ALJ No. 1996-STA-35 (ARB June 28, 2002), the ALJ found that the Complainant had engaged in protected activity based upon his testimony and on a negative inference. The ALJ wrote: "The evidence is contradictory as to whether complainant was required to falsify [his driver's daily logs and vehicle inspection reports], but as respondent did not call ... as a witness ... the individual who respondent [sic] identified as requiring the falsification, I draw the inference that complainant's testimony in this regard is truthful." The ARB found that the record supported the ALJ's finding in this regard, thereby implicitly approving the ALJ's use of an adverse inference based on the Respondent failure to call a critical witness within its control.

[STAA Whistleblower Digest II K]
SUBPOENAS; RELEVANCY; CONFUSION OR WASTE OF TIME

In ***Somerson v. Mail Contractors of America, Inc.***, 2002-STA-44 (ALJ Sept. 27, 2002), the ALJ denied issuance of a subpoena seeking the records of an FBI agent who had evidently interviewed attorneys for Respondent in relation to a prior proceeding in which Complainant had been referred for contempt to a U.S. District Court, where Complainant did not show what relevant and admissible evidence was sought or could be led to by the discovery. The ALJ also concluded that it appeared that whatever documents would be produced by such a subpoena "would be likely to raise issues whose definition and resolution would be possible only by reliance upon evidence which would be necessarily excludable on grounds of confusion or waste

of time pursuant to 29 [CFR] §18.403."

[STAA Whistleblower Digest II M]
ARB POLICY TO REPORT RECORDS FALSIFICATION TO THE DOT

See casenote on ***Poll v. R. J. Vyhnalek Trucking***, ARB No. 99-110, ALJ No. 1996-STA-35 (ARB June 28, 2002), *infra* at III G.

III. Weighing of evidence and interpretation of law, generally

[STAA Whistleblower Digest III G]
CREDIBILITY; SPECIFIC FINDING OF ALJ SUFFICIENT TO WITHSTAND SCRUTINY ON APPEAL

In ***Poll v. R. J. Vyhnalek Trucking***, ARB No. 99-110, ALJ No. 1996-STA-35 (ARB June 28, 2002), the ARB affirmed the ALJ's determination that Respondent's President's testimony as to the reason he fired Complainant was credible, despite a finding that Respondent had a policy of mandating that drivers falsify records. This was because the ALJ's credibility finding was "sufficiently specific to withstand scrutiny." The ARB, however, noted that it was referring the finding of records falsification to the Office of Motor Carriers, Federal Highway Administration, U.S. Department of Transportation.

[STAA Whistleblower Digest III J]
HEARSAY; NOT ADMISSIBLE IN STAA WHISTLEBLOWER PROCEEDINGS; ERROR IN ADMISSION, HOWEVER, NOT GROUND FOR REVERSAL UNLESS IT AFFECTS A SUBSTANTIAL RIGHT OF A PARTY

In ***Germann v. Calmat Co.***, ARB No. 99-114, ALJ No. 1999-STA-15 (ARB Aug. 1, 2002), the ARB ruled that hearsay evidence is inadmissible in STAA proceedings before an ALJ under 29 C.F.R. § 18.802, as made applicable by 29 C.F.R. § 1978.106(a). The ARB held, however, that the ALJ's erroneous admission of hearsay evidence was not reversible error, applying the "substantial right of a party" standard of 29 C.F.R. § 18.103. The hearsay testimony related to the fact that Respondent had engaged in excess hours violations and how Complainant came to know about them. The parties had already stipulated that the hours violations occurred, so the ARB concluded that the testimony could not be said to have affected a substantial right of the Respondent. Respondent also argued that the testimony prejudiced the ALJ because she could have become more sympathetic to a shop steward concerned about traffic safety. The ARB, however, reviewed the record and found no evidence that the ALJ had become biased. The ARB also reviewed other alleged instances of misuse of hearsay testimony by the ALJ and found either that the ALJ had expressly discounted the testimony, or that it would have not materially contributed to the ALJ's decision.

Compare Pogue v. United States Dept. of the Navy, 1987-ERA-21, slip op. at 24 n.16. (Sec'y May 10, 1990), *rev'd on other grounds, Pogue v. United States Dept. of Labor*, 940 F.2d 1287 (9th Cir. 1987), holding that hearsay is not inadmissible in administrative proceedings merely because it is hearsay, and citing 29 C.F.R. §§ 18.44(b) and 24.5(e) (1989). (now 24.6(e)).

[STAA Whistleblower Digest III M]
ALJ'S ERROR IN DESCRIBING LEGAL ANALYSIS NOT REVERSIBLE ERROR IF FINDINGS MEET STANDARDS OF PROPER ANALYSIS

In ***Germann v. Calmat Co.***, ARB No. 99-114, ALJ No. 1999-STA-15 (ARB Aug. 1, 2002), Respondent argued that the ALJ erred in applying the dual motive analysis instead of the pretext analysis, thereby improperly placing the ultimate burden of proof on the Respondent. The ARB, however, found that although the ALJ made references to the dual motive analysis, she did not, in fact, apply it. Rather, the ARB determined that the ALJ actually analyzed the evidence under the "pretext" framework and concluded that Complainant's protected activity was the more likely reason for the suspension. The ARB also noted that even if the ALJ had applied the dual motive analysis, such would be harmless error if the analysis included an express finding of pretext. *Citing Francis v. Bogan, Inc.*, No. 6-ERA-8, slip op. 5 n.1 (Sec'y April 1, 1988).

IV. Burden of proof and production

[STAA Whistleblower Digest IV A 2 b ii]
INFERENCE OF CAUSATION ON *PRIMA FACIE* CASE; PROXIMITY AND INTERVENING EVENT

In ***Poll v. R. J. Vyhnalek Trucking***, ARB No. 99-110, ALJ No. 1996-STA-35 (ARB June 28, 2002), the ALJ found that the Complainant failed to establish the causation element of a prima facie case because the Respondent alleged that it had discharged the Complainant because of an accident, which followed the protected complaint by about two weeks and preceded the discharge by a matter of days. The ARB, however, citing authority relating to the raising of an inference of causation based on temporal proximity, declined to adopt the ALJ's finding that a prima facie case had not been established. Rather, the ARB found "the accident somewhat less compelling in light of case precedent and the three week period at issue here. The accident simply does not represent the confluence of compelling evidence to the contrary cited by courts that have rejected the inference." The ARB, however, went on the consider the case under the pretext analysis and adopted the ALJ's alternative finding that the Complainant had failed to prove that Respondent's articulated nondiscriminatory reason for discharging the Complainant was pretext. In other words, although the evidence of an intervening event -- the accident -- was insufficient to prevent the invocation of the inference of causation under the prima facie analysis, once the Respondent articulated a nondiscriminatory reason for the adverse employment action, the prima facie analysis dropped out of the case, and it was Complainant's burden to prove pretext. Mere evidence of proximate timing was found inadequate to sustain Complainant's ultimate burden of proof by a preponderance of the evidence, given proof of the intervening accident and credible testimony of Respondent's president as to motivation for the discharge.

To the same effect: ***Gale v. Ocean Imaging***, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002).

[STAA Whistleblower Digest IV C 2 b]
PRETEXT; INFERENCE OF CAUSATION RAISED BY TEMPORAL PROXIMITY MAY NOT BE SUFFICIENT TO REBUT UNDER PRETEXT ANALYSIS

See casenote on ***Poll v. R. J. Vyhnalek Trucking***, ARB No. 99-110, ALJ No. 1996-STA-35 (ARB June 28, 2002), *supra* at IV A 2 b ii.

V. Protected activity

[STAA Whistleblower Digest V B 2 a iii]
PROTECTED ACTIVITY; REASONABLE APPREHENSION CLAUSE; ASKING FOR ANOTHER TRUCK RATHER THAN REPAIR OF ASSIGNED TRUCK IS SUFFICIENT FOR COVERAGE UNDER 31105(a)(2)

In ***Petit v. American Concrete Products, Inc.***, 1999- STA-47 (ALJ Apr. 27, 2000), the ALJ found that because the Complainant had merely asked for another truck to drive, rather than seeking repair of the assigned truck, he was not protected by STAA, section 31105(a)(2) . That section provides that (when the basis of the employee protection is a refusal to drive due to reasonable apprehension of serious injury, "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C. § 31105(a)(2). On review, in ***Pettit v. American Concrete Products, Inc.***, ARB No. 00-053, ALJ No. 1999-STA-47 (ARB Aug. 27, 2002), however, the ARB held that this ruling was not consistent with the body of relevant case law, citing, among other decisions, *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 1995-STA-38, slip op. at 2-4 (ARB Jan. 9, 1997), in which complainant's request for repair of truck or another truck to drive met his obligation to seek correction of unsafe condition.

X. Settlements

[STAA Whistleblower Digest X A 3]
SETTLEMENT BEFORE ALJ; ARB ISSUES FINAL ORDER

In ***Howick v. Experience Hendrix, LLC***, ARB No. 02-049, ALJ No. 2000-STA-32 (ARB Sept. 26, 2002), the parties reached a settlement during a recess at the hearing, and read the terms of the agreement into the record when the hearing re-convened. Thereafter, the parties failed to submit a written, signed agreement to the ALJ. Complainant argued that the settlement should not be approved, maintaining that he had agreed to it under duress. The ALJ found that Complainant failed to prove duress, and, finding that the settlement as reached at the hearing was fair, adequate and reasonable, approved the settlement and dismissed the case with prejudice.

The ARB, apparently *sua sponte*, issued a Notice of Review and Briefing Schedule, pursuant to 29 C.F.R. § 1978.109(c)(2). Subsequently, Complainant field a Notice of Appeal. Ultimately, Respondent filed a brief, but Complainant filed instead a withdrawal of all objections to the ALJ's order approving settlement and dismissal of the case.

The ARB found that the ALJ had properly reviewed and approved the settlement under 29 C.F.R. § 1978.111(d)(2). The Board held, however, that "the ARB must, nevertheless, issue a final decision in order in the case. *Monroe v. Cumberland Transportation Corp.*, ARB No. 01-101, ALJ No. [20]00-STA-50 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. [20]00-STA-17 (ARB May 30, 2001)."

[**Editor's note:** The *Howick*, *Monroe* and *Cook* rulings on the requirement that the ARB issue the final order, even though the ALJ has approved a settlement reached before the ALJ, is a reversal of course for the ARB. In a "Notice of Case Closing" in *Fisher v. ABC Trailer Sales & Rental, Inc.*, 1997-STA-20 (ARB May 29, 1998), for example, the ARB wrote: "Pursuant to 29 C.F.R. §§1978.111(d)(2) (1997), the ALJ has the authority to approve a settlement under the STAA at this stage in the proceeding. Accordingly, the ALJ's order is the final departmental

action and this case is **CLOSED**." To the same effect: *Ass't Sec'y & Ely v. Air Ride, Inc.*, 1997-STA-24 (ARB Jan. 14, 1998); *Hahn v. New Directions Tours*, 1997-STA-26 (ARB Jan. 14, 1998); *Dinkins v. Bull Market, Inc.*, 1997-STA-34 (ARB Jan. 14, 1998); *Thompson v. G & W Transportation, Co., Inc.*, 1990-STA-25 (Sec'y Oct. 24, 1990).

OALJ had been interpreting the Notices of Case Closing as meaning that ALJs issue the final order in STAA cases.]

XI. Dismissals

[STAA Whistleblower Digest XI B 3]
CONTEMPT; CERTIFICATION TO DISTRICT COURT

In *Somerson v. Mail Contractors of America*, 2002-STA-18 and 19, the ALJ had been required to terminate the hearing and have Complainant escorted from the courtroom because of his disruptive conduct. Complainant had earlier violated court orders and been abusive to court personnel on the telephone. The ALJ subsequently certified the facts to the United States District Court in the jurisdiction where the hearing took place for appropriate remedies pursuant to 29 C.F.R. § 18.29(b). *Somerson v. Mail Contractors of America*, 2002-STA-18 and 19 (ALJ Feb. 12, 2002). In ***In re Daniel S. Somerson***, No. 3:02-cv-121-J-20-TEM (D.C. M.D. Fla. Apr. 8, 2002) (unpublished), the District Court entered a Consent Order in which the court found that Complainant had engaged in unacceptable behavior, and ordered that Complainant:

> shall conduct himself within the bounds of appropriate respect and decorum, albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matters related thereto, held under the authority of the Office of Administrative Law Judges, U.S. Department of Labor, and regarding any other official purpose with any person or organization of the Office of Administrative Law Judges, U.S. Department of Labor, wherein [Complainant] is a party, a representative, a witness or other participant....

Complainant was also required to send written apologies to several OALJ judges and staff. The District Court retained jurisdiction "to enforce any violation by [Complainant] of this Consent Order and to impose any such sanction as may be provided for by law."

XIII. Relationship with other remedies

[STAA Whistleblower Digest XIII C]
GRIEVANCE ARBITRATION; STANDARD FOR WHEN TO DEFER

In ***Germann v. Calmat Co.***, ARB No. 99-114, ALJ No. 1999-STA-15 (ARB Aug. 1, 2002), the ARB ruled that the ALJ's determination not to defer to a grievance arbitration was fully consistent with the standard enunciated recently by the ARB: "Under judicial and administrative precedent, this Board defers to the outcome of another preceding only if the tribunal has given full consideration to the parties' claims and rights under the STAA. *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. [19]98-STA-8, slip op. at 9 (ARB July 28, 1999). *See also Brame v. Consolidated Freightways*, No. [19]90-STA-20, slip op. at 3, n. 3 (Sec'y June 17, 1992)."